HSBC BANK MALAYSIA BHD

v.

MACQUARIE TECHNOLOGIES (MALAYSIA) SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
ARIFIN ZAKARIA JCA
NIK HASHIM JCA
RAUS SHARIF J
[CIVIL APPEALS NOS: W-02-156-2002 & W-02-157-2002]
7 JUNE 2004

CIVIL PROCEDURE: *Amendment - Defence - Issue of election sought to be raised in amendment - Whether real question in controversy between parties would be determined - Whether delay in application to amend - Whether plaintiff prejudiced - Merits of proposed amendment - Whether irrelevant at application stage*

There were two appeals before the court against the decision of the learned judge dismissing an application to amend the defence. The parties agreed that the decision in respect of Civil Appeal No. W-02-156-2002 would bind the parties in respect of Civil Appeal No. W-02-157-2002. The facts showed that the respondent as plaintiff commenced a civil action in the lower court against the appellant as 1st defendant and another as 2nd defendant. When the 2nd defendant failed to attend a pre-trial case management, the learned judge entered a default judgment against her upon the application by the respondent. The appellant then filed the application for amendment of defence on the grounds that the default judgment obtained against the 2nd defendant amounted to an election that barred further proceedings against the appellant. The judge, however, dismissed the application and that brought the appellant's appeal to this court.

Held (allowing the appeal)
Per Nik Hashim JCA delivering the judgment of the court:

[1] The question of election in the proposed amendment could not arise before the respondent actually opted to enter judgment against the 2nd defendant. The judgment against the 2nd defendant was entered after the appellant had filed its defence. It was therefore impossible for the appellant to file the application earlier. By entering and perfecting the judgment against the 2nd defendant, the respondent had represented to the appellant that it now wished to only pursue against the 2nd defendant. Clearly, this was a question in controversy. (p 129 b-c)

[2] There was no delay by the appellant's application to amend. The application to amend was filed five months before the commencement of trial. (p 129 g)

[3] There was no prejudice occasioned to the respondent by the proposed amendment. The respondent was pre-supposing that its claim would be answered by the proposed amendment at much later stage. This was irrelevant for the purpose of contesting the application. The respondent would suffer no prejudice that could not be compensated by costs, if the application for amendment was allowed. (p 129 h)

[4] There was no basis whatsoever for the allegation of tactical maneuver on the part of the appellant. Neither was there evidence that the application was not *bona fide*. The proposed amendment was purely a question of law and the relevant facts for its purpose were mostly undisputed. The trial was not in anyway delayed by the application. (p 130 a)

[5] The learned judge erred in exercising his discretion when he ruled on the merits of the proposed amendment at the application stage. The merits of the proposed amendment was irrelevant at that stage. It was for the trial court to decide whether the appellant's claim was unmeritorious after hearing all the evidence and arguments. Further, the proposed amendment would not only be in the interest of justice but would also be for the purpose of determining the real question in controversy between the parties. The case revolved on the determination of a pure question of law and there could be no prejudice whatsoever to the respondent. (p 130 c-e)

*[**Bahasa Malaysia** Translation Of Headnotes*

Terdapat dua rayuan di hadapan mahkamah terhadap keputusan yang arif hakim kerana menolak permohonan untuk meminda pembelaan. Pihak-pihak bersetuju bahawa rayuan berkaitan Rayuan Sivil No. W-02-156-2002 akan mengikat mereka dalam Rayuan Sivil No. W-02-157-202. Fakta menunjukkan bahawa responden selaku plaintif telah memulakan satu tindakan sivil di mahkamah rendah terhadap perayu selaku defendan pertama serta terhadap seorang defendan kedua. Apabila defendan kedua gagal menghadiri pengurusan kes pra-perbicaraan, yang arif hakim telah memerintahkan penghakiman ingkar terhadapnya atas permohonan responden. Berikutnya perayu memfail permohonan untuk meminda pembelaan atas alasan bahawa penghakiman yang diperolehi terhadap defendan kedua merupakan suatu pilihan yang menghalang prosiding seterusnya terhadap perayu. Yang arif hakim, bagaimanapun, menolak permohonan sekaligus menyebabkan rayuan di sini.

Diputuskan (membenarkan rayuan)
Oleh Nik Hashim HMR menyampaikan penghakiman mahkamah:

[1] Persoalan pemilihan dalam pindaan yang dicadangkan tidak boleh berbangkit sebelum responden bertindak untuk memasukkan penghakiman terhadap defendan kedua. Penghakiman terhadap defendan kedua telah dimasukkan selepas perayu memfailkan pembelaannya. Ianya dengan itu mustahil bagi perayu untuk memfailkan permohonannya terlebih awal. Dengan memasukkan dan menyempurnakan penghakiman terhadap defendan kedua, responden mengisytihar kepada perayu bahawa ia ketika itu hanya berhasrat untuk menuntut terhadap defendan kedua. Ini jelas satu persoalan yang mengundang kontroversi.

[2] Tidak terdapat kelengahan pada permohonan perayu untuk meminda. Permohonan untuk meminda difailkan lima bulan sebelum perbicaraan bermula.

[3] Pindaan yang dicadangkan tidak sekali-kali memprejudis responden. Responden hanya membuat andaian bahawa tuntutannya akan kemudiannya dijawab oleh pindaan yang dicadangkan. Ini adalah tidak relevan bagi maksud membantah permohonan. Responden tidak mengalami apa-apa prejudis yang boleh dipampas dengan kos, jika permohonan untuk pindaan dibenarkan.

[4] Pengataan bahawa perayu melakukan pergerakan taktikal adalah langsung tidak berasas. Juga tidak terdapat keterangan yang menunjukkan bahawa permohonan adalah tidak *bona fide*. Pindaan yang dicadangkan tentunya merupakan satu persoalan undang-undang dan fakta-fakta berkaitan tujuannya adalah kebanyakannya tidak dibantah. Permohonan juga tidak menyebabkan apa-apa kelengahan pada perbicaraan.

[5] Yang arif hakim tersilap dalam melaksanakan budi bicaranya bila beliau memutuskan berdasarkan merit pindaan yang dicadangkan itu di peringkat permohonan. Merit pindaan yang diicadangkan adalah tidak relevan di peringkat itu. Tugas untuk menentukan sama ada tuntutan perayu bermerit ataupun tidak adalah terletak pada mahkamah bicara selepas mendengar segala hujah dan keterangan. Lagipun, pindaan yang dicadangkan bukan sahaja untuk kepentingan keadilan tetapi juga untuk tujuan menentukan persoalan sebenar yang menjadi kontroversi di antara pihak-pihak. Kes ini berkisar pada persoalan undang-undang dan responden tidak diprejudis oleh sesuatu apa pun.

Case(s) referred to:
Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 CA ***(refd)***
Ponnusamy v. Nathu Ram [1959] MLJ 228 ***(refd)***
State of Queensland & Anor v. JL Holdings Pty Ltd (141) ALR 353 ***(refd)***
Vincent Tang Fook Lam v. Sok Chun Tang [2004] 1 CLJ 296 CA ***(refd)***
Wong Ah Hee & Anor v. Low Tuck Hoong [1993] 2 AMR 48 ***(refd)***
Wright Norma v. Oversea-Chinese Banking Corp Ltd [1994] 1 SLR 513 ***(refd)***
Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:
Bills of Exchange Act 1949, s. 24
Rules of the High Court 1980, O. 20 r. 5, O. 34 r. 3(1)

For the appellant - Lambert Rasa-Ratnam (BH Yap); M/s Lee Hishammuddin
For the respondent - TJ Su (KL Pang); M/s Cheah Teh & Su

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim JCA:

Background

There are two appeals before the court and both of them raise identical issues. In the circumstances, the parties have agreed that the decision in respect of Civil Appeal No. W-02-156-2002 binds the parties in respect of Civil Appeal No. W-02-157-2002. The court acceded to the agreement.

The appellant (the 1st defendant) filed an application before the learned judge in chambers for amendment by inserting a new para. 13 in its statement of defence pursuant to O. 20 r. 5 of the Rules of the High Court 1980 (the RHC). The application was dismissed. Hence this appeal.

The facts that led to the application by the 1st defendant are that the respondent plaintiff commenced a civil action in the High Court against the 1st defendant and one Hamidah as the 2nd defendant. As against the 1st defendant, the plaintiff alleged that the signatures on 117 cheques with a total face value of RM483.591.21 (Civil Appeal No. W-02-156-2002) and on 154 cheques with a total face value of RM1,244,255.72 (Civil Appeal No. W-02-157-2002) were forged by the 2nd defendant. Therefore, the aforesaid sums were wrongfully paid out from the plaintiff's account by the 1st defendant. As against the 2nd defendant, the plaintiff alleged that she had converted the cheques and sought recovery under the doctrine of "money had and received". Thus, the plaintiff's cause of action against the 1st defendant is based on s. 24 of the Bills of Exchange Act 1949 whereas the cause of action against the 2nd defendant was for the tort of conversion.

On 16 January 2001 upon the application by the plaintiff's counsel, the learned judge entered judgment against the 2nd defendant who failed to turn up for pre-trial case management pursuant to O. 34 r. 3(1) of the RHC after she had filed her defence. After the default judgment against the 2nd defendant was entered and perfected, the 1st defendant filed the application for amendment of its defence on 5 November 2001. The proposed amendment reads:

> 13. The plaintiff had entered judgment against the 2nd defendant on 16.1.2001. As a consequence thereof, the plaintiff is prevented and or estopped from further proceedings with its claim against the 1st defendant and or the entry of judgment against the 2nd defendant by the plaintiff in law amounts to an election which bars further proceedings of the plaintiff s claim against the 1st defendant.

It is to be noted that on 29 March 2001, the learned judge fixed trial dates on 5 November 2001 to 8 November 2001. On 1 November 2001 the plaintiff served its last bundle of documents. The learned judged adjourned the trial date to 15 April 2002.

Grounds For Amendment

The grounds for the application for the proposed amendment were as follows:

(a) The plaintiff had entered judgment in default against the 2nd defendant on 16 January 2001;

(b) The 1st defendant's solicitor only knew on 25 October 2001 that the judgment against the 2nd defendant was sealed;

(c) It is a good defence of the 1st defendant based on the fact that the plaintiff had entered judgment against the 2nd defendant and therefore the plaintiff is prevented and or estopped from proceeding his claim against the 1st defendant and or the plaintiff by entering judgment against the 2nd defendant in law amounts to an election which prevents further proceedings of its claim against the 1st defendant;

(d) The proposed amendment could not be included in the defence due to the fact that the judgment entered against the 2nd defendant took place after the defence was filed;

(e) The proposed amendment is to identify the real issue between the plaintiff and the 1st defendant and so that the proposed amendment can be pleaded and argued;

(f) The amendment will not prejudice the plaintiff.

Judge's Decision

The learned judge dismissed the application. From the grounds of judgment, the learned judge appears to have dismissed the application for three reasons:

(a) On the merits of the issue sought to be raised by the proposed amendment;

(b) If the proposed amendment was allowed and the issue of law raised by it was subsequently found in favour of the 1st defendant, the merits of the plaintiff's case would not be decided after the benefit of a full trial; and

(c) Delay.

Contentions Of Parties

It is the submission of learned counsel for the 1st defendant that the learned judge was wrong to have dismissed the application for the reasons he gave. Learned counsel for the plaintiff, on the other hand, argued that the proposed amendment was unmeritorious and not *bona fide*, and that the application being late, was a tactical manoeuvre which amendment, if allowed, would result in prejudice to the plaintiff which could not be compensated with costs.

Decision

The law governing amendment of pleadings are well-established. Mohd Noor Ahmad JCA (as he then was) in the recent case of *Vincent Tang Fook Lam v. Sok Chun Tang (P)* [2004] 1 CLJ 296 at pp. 308-309 reiterated the law:

> The law on amendment of pleadings is well-settled. The provision relating to amendment of the writ and pleadings is governed by O. 20 r. 5 of the Rules of the High Court 1980 ('the RHC'). It is trite that amendments can be made at any stage of the proceedings including at the trial. The general principle is that the court will allow such amendments as will cause no injustice to the other parties. It is equally trite that if the application is allowed, the opposite party will normally be compensated by way of costs. Be that as it may, the Federal Court, the apex court of this country, had the occasion to consider and interpret O. 20 r. 5 of the RHC. It is the case of *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 where the Federal Court set out three basic questions for consideration, *viz:*
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> (1) whether the application was *bona fide*;
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> (2) whether the prejudice caused to the other side can be compensated by costs; and
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> (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

(see *Raphael Pura v. Insas Bhd & Anor* [2001] 1 MLJ 49 at p. 53). It was for the plaintiff who asked the court to exercise a discretionary power in her favour to place some material and advance some cogent reasons to impel the court to lean on her side (see *Multi-Pak Singapore Pte Ltd (in receivership) v. Intraco Ltd & Ors* [1992] 2 SLR 793; [1993] 2 SLR 113). As for the general principles for the granting of leave to amend, this was elaborated by adoption in *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 MLJ 230 SC at p. 232 by Abdul Hamid Ag LP, where he stated and cited:

> As for the general principles for the granting of leave to amend:
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> It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made 'for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings' (see per Jenkins LJ in *GL Bakar Ltd v. Medway Building & Supplies Ltd* [1958] 1 WLR 1216, p 1231; [1958] 3 All ER 540, p 546).
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> It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Court do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right (per Bowen LJ in *Cropper v. Smith* [1883] 26 Ch D 700, pp. 710-722, with which observations AL Smith LJ expressed 'emphatic agreement' in *Shoe Machinery Co v. Cultam* [1896] 1 Ch 108, p. 112).
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> In *Tildesley v. Harper* [1876] 10 Ch D 393, pp. 396, 397 Bramwell LJ said:
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> My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise. (*The Supreme Court Practice* 1985 para 20/5-8/6 p 340).

A party may in any pleading plead any matter which has arisen at any time, whether before or since the issue of the writ (O. 18 r. 9 of the RHC). And the court is empowered to allow amendments of any document for the purpose of determining the real question in controversy between the parties (O. 20 r. 8(1) of the RHC). In *Wright Norma v. Oversea-Chinese Banking Corp Ltd* [1994] 1 SLR 513, the Court of Appeal of Singapore at p. 515 held:

> It is trite law that an amendment which would enable the real issues between the parties to be tried should be allowed subject to penalties on costs and adjournment, if necessary, unless the amendment would cause injustice or injury to the opposing party which could not be compensated for by costs or otherwise ... This is so even though the omission was caused by careless or the application for amendment was made very late in the day: per Brett MR in *Clarapede & Co v. Commercial Union Association* [1883] 32 WR 262 at p 263.

The authorities have shown that the courts do readily grant leave to amend before trial. In *Abdul Johari Abdul Rahman v. Lim How Chong & Ors* [1997] 1 CLJ 361 at p. 374 Abdul Malek Ahmad JCA (as he then was) in delivering the judgment of the Court of Appeal said:

> The authorities strongly indicate that the courts should lean in granting applications for amendments even when a new cause of action or line of defence is raised provided it is based on the same facts or arose out of the same transaction subject, however, to an award of costs to the other party for the injustice caused by the amendments.

However, the materiality and effectiveness of the proposed amendment are relevant consideration. The court will not allow an amendment where the probable consequences of such an amendment would be useless or ineffectual. Good J in *Ponnusamy v. Nathu Ram* [1959] MLJ 228 said that in an application to amend the pleadings, the court should consider the materiality and the effectiveness of the amendment, and that it was a well established practice not to allow an amendment where it appeared that such an amendment would be useless. It was further held that the court should look at the probable consequences of the amendment and if the amendment would be ineffectual then it ought not to be allowed to be made (see also *Wong Ah Hee @ Wong Ah Moi & Anor v. Low Tuck Hoong* [1993] 2 AMR 48). The High Court of Australia in the *State of Queensland & Anor v. JL Holdings Pty Ltd* (141) ALR 353 referred to *Cropper v. Smith* which held that:

> As the defence, if established, would be a complete answer in either action, the amendments sought should have been allowed unless it appeared that injustice would thereby have been occasioned to the respondent, there being nothing to suggest fraud or improper concealment of the defence on the part of the appellants.

Therefore, the proposed amendment has the effect, if determined in favour of the 1st defendant, of providing a complete answer to the plaintiff's claim.

Thus, applying the law to the facts of the instant case, we find much merit in the application. The proposed amendment is intended to raise the issue of election: whether the plaintiff is prevented from further proceeding of its claim against the 1st defendant after it has entered judgment against the 2nd defendant. The question of election as sought to include in the proposed amendment cannot arise before the plaintiff actually opted to enter judgment against the 2nd defendant. The judgment against the 2nd defendant was entered after the 1st defendant had filed its defence.

It is therefore impossible for the 1st defendant to file the application earlier than 16 January 2001. By entering and perfecting the judgment against the 2nd defendant, the plaintiff had represented to the 1st defendant that it now wished to only pursue against the 2nd defendant. Clearly, this is a question in controversy.

On the question of delay, it is worthy of note that delay alone is not a ground to refuse an application for leave to amend. In *Wright Norma, supra*, at p. 519 the court held:

> While the time at which an amendment is made is a relevant consideration it is not necessarily decisive. Delay *per se* does not equal prejudice or injustice. We do not think any rigid rule should or can be laid down on this.

It was further held at p. 523 that:

> ... the learned judge ... had erred in exercising his discretion when ... he treated delay as being decisive to the question. It is but one factor to be placed on the scale.

In the present case, the court had adjourned the trial of the action to commence on 15 April 2002. The application to amend was filed on 5 November 2001, five months before the commencement of trial. Therefore, it cannot be argued that there was inordinate delay in the context of trial. An unreported decision of English Court of Appeal in *Carmen Proetta v. Times Newspapers Ltd* (followed in *Wright Norma*) even allowed an application to amend defence which was made 10 days before trial.

With regard to the question of prejudice, there is no immediate prejudice occasioned by the proposed amendment at this stage. The plaintiff was presupposing that its claim would be answered by the proposed amendment at much later stage. In our view, this is irrelevant for the purpose of contesting the application. The plaintiff would suffer no prejudice that cannot be compensated by costs, if the application for amendment is allowed.

Respecting the alleged tactical manoeuvre, we find there is no basis whatsoever for the allegation. Neither there is evidence that the application was not *bona fide*. The proposed amendment sought herein is purely a question of law and the relevant facts for its purpose are mostly undisputed. The trial was not in anyway delayed by the application. In fact, the plaintiff was to be blamed for serving its last bundle of documents on the evening of 1 November 2001. This was the basis for the trial to be adjourned by the court to 15 April 2002.

Besides, the merit of the proposed amendment is not relevant at the application stage. Learned counsel for the plaintiff argued that the doctrine of election has no application in this case, and as such, the proposed amendment would be useless and ineffectual. That may or may not be so, but at the end of the day, it is for the trial court eventually to decide whether the 1st defendant's claim is unmeritorious after hearing all the evidence and arguments: *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428. Thus, the learned judge erred in exercising his discretion when he ruled on the merits of the proposed amendment at that stage.

Conclusion

It is therefore our view that the learned judge had not exercised his discretion judiciously when he dismissed the application. The court should in the exercise of its discretion allow the amendment even if it had the effect of introducing a plea of election for the first time on the ground that the amendment would not only be in the interest of justice but also for the purpose of determining the real question in controversy between the parties. The case revolved on the determination of pure question of law and there could be no prejudice whatsoever to the plaintiff. Indeed, it would be a denial of justice if leave to amend were refused.

Accordingly, we allowed the appeal with costs and set aside the order of the learned judge. The deposit paid into court was ordered to be refunded to the 1st defendant. The application to amend was granted in terms of the summons in chambers dated 5 November 2001 with costs to be borne by the 1st defendant.